

FILED
CLERK'S OFFICE

JUN 03 2005 1:38

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL HUNTER

Petitioner,

v.

LUIS SPENCER

Respondent,

Civil Action No. 05-10904-NG

**PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION TO
DENY RESPONDENT'S MOTION TO DISMISS**

This memorandum is submitted in support of Michael Hunter's (the petitioner) Motion To Deny The Motion To Dismiss filed by Luis Spencer (the respondent). The Petitioner as grounds asserts his petition is not time barred and further asserts the request by the Court in its Order for the respondent to file such documents which reflect on the issue as to whether the petitioner exhausted available state remedies resulted in the respondent asserting, "[he] will not, in the interest of economy, answer the petition or address any additional affirmative defenses." (respondent's memorandum, note 1).

PRIOR PROCEEDINGS

1
2 Against the background of the prior proceedings made on
3 pages 1-2 of the Respondent's Memorandum, the Petitioner adds
4 that Magistrate Judge Lawrence P. Cohen on January 11, 1999
5 found that matters raised in his earlier related Petition were a
6 mixed petition within the meaning of *Rose v. Lundy*, 455 U.S. 509
7 (1982) and dismissed the petitioner's petition for want of
8 exhaustion which, tolled the statute of limitations (see *Hunter*
9 *v. Hall*, 98-cv-12500). Consequently, on October 23, 2003, the
10 petitioner filed a Motion For A New Trial in order to exhaust
11 his remedies concerning ineffective assistance of counsel. This
12 motion was assigned to Judge Brassard who while denying the
13 motion on June 25, 2004, entered on the docket, "After review of
14 the papers, including the decision of the Committee not to
15 assign counsel, Denied" (see docket entry 99).
16

17 The Petitioner filed a Notice Of Appeal on July 13, 2004.
18 The Middlesex Superior court clerk contacted the Petitioner and
19 informed him that they would docket the appeal but before they
20 could proceed, the Petitioner first had to petition the SJC for
21 leave. On July 25, 2004 and again on October 22, 2004, the
22 Petitioner petitioned the SJC for Leave To Proceed On Appeal In
23 forma pauperis and For Leave To Be Heard On The Original Record.
24 The SJC clerk would not respond nor contact the Petitioner and
25 it became clear that the decision of the Committee for Public

1 Counsel Services not to assign counsel had become a determining
2 factor concerning his motion for a new trial by Judge Brassard
3 and that it was now futile to continue contacting the SJC since
4 the record made it clear that counsel would not be assisting him
5 with the appeal.

6 **ARGUMENT**

7 First, as mentioned above, for want of exhaustion, the
8 statute of limitations was tolled and this Petition is not time
9 barred.

10 Second, the Respondent concedes in footnote 2 of his
11 memorandum of law, that the SJC did not respond to the motions
12 the petitioner filed even when the Court knew of the
13 Petitioner's attempts to appeal the final judgment of June 25,
14 2004 in August 2004.

15 Therefore, the interest of justice should out weigh the
16 interest of economy the respondent asserts is clear where 1),
17 the state court's use of a decision by the Committee for Public
18 Counsel Services to not assign counsel to the petitioner was
19 used by Judge Brassard to assist him with making a determination
20 in the Petitioner's motion for a new trial (see docket entry 99)
21 which should not have been a determining factor and 2), where
22 due to a lack of any response or contact from the SJC concerning
23 the appeal of the superior court's final decision the petitioner
24 was not afforded any redress until now.
25

CONCLUSION

For the foregoing reasons, the Respondent's Motion To
Dismiss should be denied.

Dated this 2 day of June, 2005

Michael K. Hunter

Michael K. Hunter,
In forma pauperis
P.O. Box 43
Norfolk, MA 02156

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was
served on

Susanne G. Reardon
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, MA 02108

By first class mail, postage prepaid on June 2, 2005

Michael K. Hunter

Michael K. Hunter,
In forma pauperis
P.O. Box 43
Norfolk, MA 02056